BEFORE THE MARICOPA COUNTY
AIR POLLUTION HEARING BOARD

In the matter of:	)	
	)	**ORDER AND DECISION**
ZINKE DAIRY, INC.	)	
d/b/a Zinke Investments LTD Partnerships	)	
2675 E. Germann Rd.	)	Causes No. MCAPHB2009-002-OA
Gilbert, AZ 85297	)	MCAPHB2009-003-OA
	)	

BEFORE:

Kimberly W. MacEachern, chair, Jean McGrath, Phil Noplos, and Gary Van Hofwegen, members. Member Phil Noplos participated in the hearing, but not in the decision, of this matter.

APPEARANCES:

Roger K. Ferland and Michelle De Blasi, Quarles & Brady, LLP, represented Zinke Dairy, Inc. Kevin S. Costello and Daniel Brenden, Maricopa County Attorney's Office, represented the Maricopa County Air Quality Department.

PROCEDURAL HISTORY:

The Maricopa County Department of Air Quality (Department) issued an Order of Abatement, No. 2009-000, to Zinke Dairy, Inc. on August 10, 2009. Zinke Dairy, Inc. d/b/a Zinke Investments LTD Partnerships (Zinke) filed a request for hearing on September 4, 2009, Cause No. MCAPHB2009-002-OA. The Department subsequently issued a second Order of Abatement, No. 2009-001, to Zinke on October 29, 2009. On October 30, 2009, the Department gave notice that it was withdrawing Order of Abatement No. 2009-000, the subject of Cause No. MCAPHB2009-002-OA. Zinke filed a request for hearing on Order of Abatement No. 2009-001 on November 2, 2009, Cause No. MCAPHB2009-003-OA. The hearing in Cause No. MCAPHB2009-002-OA is scheduled for November 19 and 20, 2009.

Zinke has now filed a motion to consolidate Causes Nos. MCAPHB2009-002-OA and MCAPHB2009-003-OA. By stipulation of counsel, Zinke has waived the 15-day notice requirement of A.R.S. § 49-498(B) and requested that both Causes be heard on the hearing noticed for November 19 and 20, 2009. The Department, while not conceding

that both Orders of Abatement remained before the Board, did not object to consolidation and proceeding with a hearing on November 19 and 20, 2009.

A public hearing was held on November 19, 2009. The Board requested that the parties make opening statements and specifically address the theory of the case, including the threshold jurisdictional matters addressed in the pleadings during which the Department agreed that the activity in question was a "regulated agricultural activity" and that the activity itself did not occur on October 29, 2009. Petitioner Zinke Dairy, Inc. made opening argument and subsequently introduced partial testimony from Mr. Zinke and from Ms. Fish. The Board interrupted the hearing and entered a Scheduling Order requiring the parties to brief the jurisdictional issues raised by this matter. The briefs on the jurisdictional issues were considered by the Board at its December 7, 2009 meeting.

DISCUSSION:

This matter represents an effort by the Department to prevent alleged excessive dust generated by Zinke during laser leveling of approximately 80 acres of fields within the Maricopa County PM_{10} nonattainment area. The Department initially issued Order of Abatement No. 2009-000 citing MCAPC Rules 310, § 302.1, § 303.1.a, § 304.3 and 305.11. Zinke appealed, challenging the Department's authority to regulate agricultural activities under Rule 310. On October 29, 2009, the Department purported to withdraw Order of Abatement No. 2009-000 and issued Order of Abatement No. 2009-001, which ordered Zinke to cease excessive dust emissions pursuant to MCAPC Rule 100, § 301. Zinke timely appealed, once again challenging the Department's authority to regulate dust allegedly from agricultural activities.

The first issue presented to the Board is whether the requests for hearing on Order of Abatement No. 2009-000 and Order of Abatement No. 2009-001 should be consolidated, as requested by Zinke and without objection from the Department. The Board finds that both Orders of Abatement arise from a common nucleus of operative fact and that consideration of the two Orders in a common hearing is protective of agency and Board resources. Accordingly, the Board grants the motion to consolidate without prejudice to the parties' arguments concerning whether Order of Abatement No. 2009-000 is properly before the Board.

The second issue presented to the Board is whether the Department may withdraw Order of Abatement No. 2009-000 after a request for hearing was lodged with the Board. The general rule is that once an appeal of an order or matter is lodged, the agency before which the matter was pending loses jurisdiction to the appellate body. In this case, the Board serves as the appellate body to conduct hearings on Orders of Abatement pursuant to A.R.S. § 49-490(A). The Board thus agrees with Zinke that the Department may not, *sua sponte*, withdraw an Order of Abatement once appealed to the Board without leave of the Board. Nevertheless, the Board will treat the Department's withdrawal of Order of Abatement No. 2009-000 as a motion for leave to withdraw. The Board finds that the withdrawal of Order of Abatement No. 2009-000 is well-considered and not for the

purpose of defeating the Board's jurisdiction. Accordingly, the Board grants the Department's motion to withdraw Order of Abatement No. 2009-000.

The third, and major, issue presented to the Board is whether the Department has jurisdiction to regulate Zinke's laser leveling activity. The Department, through its counsel, stipulated that Zinke's activities constitute "regulated agricultural activities" as that term is defined in A.R.S. § 49-457.N.5. The Department nevertheless argues that it may bring an action pursuant to MCAPC Rule 100, § 301 to prevent localized problems. Zinke contends that any Department action is preempted by the agricultural Best Management Practices general permit (AGP) issued pursuant to A.R.S. § 49-457 and implemented pursuant to A.A.C. R18-2-610 and R18-2-611.

The Board does not find any indication that the legislature expressly preempted the Department and/or Maricopa County generally from seeking to regulate excessive dust from "regulated agricultural activities" as that term is used in A.R.S. § 49-457. Neither the statutory language of A.R.S. § 49-457 nor the legislative history of that provision provides the requisite "clear manifestation of legislative intent" that the legislature sought to oust local authorities from enforcing rules for local situations. *See, e.g., Wonders v. Pima County*, 207 Ariz. 576, 579, 89 P.3d 810, 813 (Ct. App. 2004).

Not finding express preemption, the Board evaluated whether the legislature has so fully occupied the field that local control is ousted. *See State v. McLamb,* 188 Ariz. 1, 4 (Ct. App. 1996). The Board notes that A.R.S. § 49-457 by its terms applies to "commercial farming practices that may produce PM-10 particulate emissions within the regulated area." A.R.S. § 49-457(N)(5). This language suggests that all commercial farming practices are within the ambit of the AGP. A.R.S. § 49-457(H) states that regulated agricultural activities are not subject to a permit pursuant to A.R.S. § 49-426 except as provided by A.R.S. § 49-457(K). A.R.S. § 49-480 limits the County's permit authority to sources subject to A.R.S. § 49-426. *See, e.g.,* A.R.S. § 49-480(A). Because regulated agricultural activities are exempt from A.R.S. § 49-426 permitting (unless A.R.S. § 49-457(K) applies), they are therefore also exempt from County permitting jurisdiction. Similarly, A.R.S. § 49-457 provides elaborate provisions for ADEQ enforcement of the AGP. *See, e.g.,* A.R.S. § 49-457(I), (J) & (K). These provisions leave no room for Department or County action, other than requesting that ADEQ act. Finally, A.R.S. § 49-504 provides that the County, and hence the Department, may not "[p]revent the normal farm cultural practices which cause dust." A.R.S. § 49-504(4).

In *Ashton Co v. Jacobson*, 19 Ariz. App. 371, 507 P.2d 983 (Ct. App. 1973), the Court of Appeals examined the situation where the Pima County Attorney sought to bring a criminal case against Ashton for violating state air laws when the State Division of Air Pollution Control had not taken action. The Court held that the Pima County Attorney had no authority to bring such action, reasoning that "where a statute restricts the making of a complaint to certain persons, only such persons may do so," and that "construing the Act as a whole, [] it evinces a legislative purpose that enforcement of matters confided to the original jurisdiction of the State Division be left to that administrative body." 19 Ariz. App. at 374, 507 P.2d at 986. In 1984, the Attorney General concluded that where

the state has "original" jurisdiction, it actually has "exclusive" jurisdiction. *See* Arizona Atty. Gen. Op. I84-156, at 1. In this case, the legislature has assigned BMPs and their enforcement to a state committee (to develop the BMPs) and ADEQ (to implement and enforce the program). *See* A.R.S. § 49-457. Given the comprehensive nature of A.R.S. § 49-457, the limits on permitting authority by either ADEQ or the county, the specific enforcement provisions limiting initial enforcement to ADEQ, the limits on County program authority in A.R.S. § 49-504(4) and the holding in *Ashton Co.*, the Board finds that the state has fully occupied the field and therefore holds that County, and hence Department, regulation of regulated agricultural activities is precluded under Chapter 3, Article 3 of the Arizona Revised Statutes. The County and the Department are not precluded, however, from asserting other legal rights or remedies that they may have. *See* A.R.S. § 49-516.

In reaching this conclusion, the Board is mindful that ADEQ rendered an opinion that Zinke's activities were not "regulated agricultural activities" within the meaning of A.R.S. § 49-457. In this case, however, the Department stipulated that Zinke's activities were "regulated agricultural activities" and that stipulation is controlling as to the characterization of Zinke's activities in this proceeding. Further, the record before the Board shows, and Board members with expertise in Maricopa County agricultural practices concur, that Zinke was engaged in activities (e.g., laser leveling of a field for water conservation) that are agricultural in nature and which produce dust. This meets the literal definition of "regulated agricultural activities" set forth in A.R.S. § 49-457(N)(5). While ADEQ is the implementing agency, it is not the promulgating agency (the best management practices committee for regulated agricultural activities (the "Committee") is the promulgating agency), and therefore ADEQ's opinion is not entitled to *Chevron* deference, but is only persuasive evidence of the proper interpretation. As the Supreme Court instructed in *United Ass'n of Journeymen v. Marchese*, 81 Ariz. 162, 302 P.2d 930, *opinion supplt'd* 82 Ariz. 30, 307 P.2d 1038, the Board has authority to establish whether it has jurisdiction. In this case, the stipulation and evidence before the Board lead ineluctably to the conclusion that the Board, and hence the Department, lack jurisdiction over the complained of "regulated agricultural activities."

The Board believes that, based on the papers filed before it, the AGP perhaps did not work as well as hoped in reducing particulate emissions from leveling activities in this instance. The Board is heartened by counsel for Zinke's statement that Zinke has contacted the Committee to evaluate establishment of best management practices for leveling. The Board encourages ADEQ and the Committee to seek input from the Department to ensure that the Committee's BMPs, and ADEQ's enforcement of them, will preserve the health and welfare of Maricopa County residents.

FINDINGS OF FACT:

1. The request for hearing on Order of Abatement No. 2009-000, Cause No. MCAPHB2009-002-OA, was received within thirty days as required by A.R.S. § 49-511(B)(4).

2. The request for hearing on Order of Abatement No. 2009-001, Cause No. MCAPHB2009-003-OA, was received within thirty days as required by A.R.S. § 49-511(B)(4).
3. Notice of the hearing scheduled for November 19 and 20, 2009 was given as provided in A.R.S. § 49-498.
4. Zinke has waived the fifteen day notice required pursuant to A.R.S. § 49-498(B) and the hearing date otherwise meets the 30-day requirement of A.R.S. § 49-490(A).
5. Both Orders of Abatement and requests for hearing involve common issues of fact.
6. The County seeks to withdraw Order of Abatement No. 2009-000.
7. MCAQD stipulates, for purposes of this hearing, that Zinke's activities constitute "regulated agricultural activities" within the meaning of the agricultural Best Management Practices permit issued pursuant to A.R.S. § 49-457.

CONCLUSIONS OF LAW:

1. The Board has jurisdiction over both Order of Abatement Nos. 2009-000 and 2009-001, at least as to determining its jurisdiction.
2. The notice requirements of A.R.S. §§ 49-490, 49-498 and 49-511 are met by the notice in Cause No. MCAPHB2009-002-OA and Zinke's and the Department's stipulations where they involve common issues of fact and law and the parties and public have received notice that a hearing on those issues will occur.
3. The common issues of fact and law demonstrate that consolidation of Causes Nos. MCAPHB2009-002-OA and MCAPHB2009-003-OA is in the interest of administrative and judicial economy.
4. The Board concurs with the Department's withdrawal of Order of Abatement No. 2009-000 on the basis that it is inconsistent with MCAPC Rule 310, § 103.1 and Rule 310.01, § 103.1.
5. The Board holds that A.R.S. § 49-457 does not expressly preempt MCAQD from bringing an action pursuant to MCAPC Rule 100, Section 301 against petitioner Zinke Dairy, Inc.
6. The Board holds that A.R.S. §§ 49-457 and 49-504.4, read together, demonstrate that the legislature sought to occupy the field and preempt local county regulation of "regulated agricultural activities" as that term is defined in A.R.S. § 49-457.
7. Because the Department has conceded that Zinke's activities are "regulated agricultural activities" within the scope of A.R.S. § 49-457, Order of Abatement No. 2009-001 is preempted by the agricultural Best Management Practices general permit.
8. Accordingly, the Hearing Board revokes Order of Abatement No. 2009-001.

It is **ORDERED** as follows:

1. Causes Nos. MCAPHB2009-002-OA and MCAPHB2009-003-OA are consolidated in MCAPHB2009-002-OA. All future filings and pleadings should be submitted under the consolidated Cause No. MCAPHB2009-002-OA.

2. Order of Abatement No. 2009-000 is hereby withdrawn upon application of the Department with the consent of the Board.
3. Order of Abatement No. 2009-001 is revoked as exceeding the jurisdiction of the Department and the Control Officer for the reasons stated herein.

So ordered this 10th day of December, 2009.

We concur:

Kimberly W. MacEachern, Chair

Jean McGrath, Member

Gary Van Hofwegen, Member